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April 21, 2010

Hon. Neal P. McCurn
Senior U.S. District Court Judge
U.S. District Court for the Northern District of New York
Federal Building and U.S. Courthouse
P.O. Box 7365
Syracuse, NY 13261-7365

Re: Jeffrey Thrall v. CNY Centro, Inc., et al.; Civil Action No. 5:09-CV-567 (NPM/GHL)

Your Honor:

I spoke briefly with your Law Clerk this morning over the telephone. I am proceeding pursuant to her direction. Please consider this as a Letter Motion to supplement the Record in connection with the Motions presently pending before this Court.

In this regard, annexed hereto as Exhibit A is a copy of the Transcript of Oral Argument and Decision dated April 7, 2010, and Order and Judgment of New York State Supreme Court Justice James P. Murphy dated and filed April 19, 2010, granting, inter alia, the Petitioner Jeffrey Thrall Summary Judgment in New York State Supreme Court Article 78 Proceeding, Index No: 2003-7935; RJ I No: 33-03-4643. A copy of the aforementioned Transcript, Decision, Order and Judgment, with Notice of Entry was personally served on Attorney Craig Atlas on April 20, 2010.

On the motion for summary judgment the following exhibits were annexed to my Supplemental Affidavit in support of the Petitioner's Motion: (Exhibit A) Affidavit of Federal Mediator Edward Garrow; (Exhibit B) Business Records Certification by Dawn E. Starr, General Counsel of the Federal Mediation and Conciliation Service, certifying: (exhibit a) Letter of John W. Pinto Jr., DMS dated August 25, 2004 to Frank Kobliski, CEO CNY CENTRO and Chuck Watson, Business Agent, ATU Local 580; (exhibit b) Facsimile dated 8/24/04 from Edward Garrow to Mr. John Pinto, Jr., DMS; (exhibit c) Request For Grievance Mediation As Provided Through Federal Mediation & Conciliation Service dated 7-23-03 signed by John Renock and Chuck Watson; (exhibit d) FMCS Grievance Mediation Agreement dated 7-23-03 signed by John Renock and Chuck Watson. The foregoing documents are available for review by the Court. In the event I am directed to do so I will file the aforementioned documents with the court.

Respectfully submitted,

Robert Louis Riley, Esq.

cc Craig Atlas, Esq.
Nathaniel Lambright, Esq.
Plaintiff Jeffrey Thrall

EXHIBIT A

SUPREME COURT
STATE OF NEW YORK **COUNTY OF ONONDAGA**

JEFFREY THRALL
4225 Lafayette Rd
Jamesville, NY 13078

Petitioner,

v.

Index Number: 2003-7935

RJI No. 33-03-4643

HON. JAMES P. MURPHY JSC

CNY CENTRO, INC.
200 Cortland Avenue
Syracuse, NY 13207,

ORDER AND JUDGMENT

CENTRAL NEW YORK REGIONAL TRANSPORTATION AUTHORITY
200 Cortland Avenue
Syracuse, NY 13207,

Respondents.

THIS COURT having signed an Order dated November 9, 2009 vacating the prior Order and Judgment of this Court by the Honorable William R. Roy signed March 30, 2004, to the extent that said Order and Judgment of the Honorable William R. Roy held that the Respondents properly followed the grievance procedure under the collective bargaining agreement, that the decision of the Grievance Review Board in this matter is final and binding and should not be disturbed, and that the Amended Petition is dismissed in its entirety, and this matter thereafter having been set down for a hearing pursuant to CPLR Article 78 to be held April 7, 8, 9, 2010, and,

THE PETITIONER, having moved for Summary Judgment pursuant to CPLR § 3212, and the Respondents having made a Prehearing Motion to Dismiss, and this matter having come on for the Hearing on April 7, 2010, and,

15:00 04/19/10 ONONDAGA COUNTY CLERK CP

UPON THE READING AND FILING, of the Petitioner's Notice of Motion for Summary Judgment pursuant to CPLR § 3212, dated March 30, 2010, the Affidavit of the Petitioner's Attorney Robert Louis Riley, Esq., sworn to March 30, 2010, in support of Petitioner's motion for Summary Judgment, together with the exhibits annexed thereto, the Supplemental Affidavit of Petitioner's Attorney Robert Louis Riley, Esq., sworn to April 5, 2010, in support of the Petitioner's motion for Summary Judgment, together with the exhibits annexed thereto, the Affidavit of the Respondents' Attorney Craig M. Atlas, Esq. (Ferrara Fiorenza Larrison Barrett & Reitz PC) sworn to April 5, 2010 in opposition to the Petitioner's motion for Summary Judgment, together with the exhibits annexed thereto; the Respondents' Notice of Prehearing Motion to Dismiss dated March 30, 2010, the Affirmation of Respondents' Attorney Craig M. Atlas, Esq. (Ferrara Fiorenza Larrison Barrett & Reitz PC) dated March 30, 2010 in support of Respondents' prehearing motion to dismiss, together with the exhibits annexed thereto, the Affidavit of Petitioner's Attorney Robert Louis Riley, Esq., sworn to April 5, 2010, in opposition to a Respondents prehearing motion to dismiss, together with Exhibit A annexed thereto, and

AFTER HEARING, the arguments of Petitioner's Attorney Robert Louis Riley, Esq., in support of the Petitioner's motion for Summary Judgment and in opposition to the Respondents' Prehearing Motion to Dismiss the Petition, and the argument of Respondents' Attorney, Craig M. Atlas, Esq., (Ferrara Fiorenza Larrison Barrett & Reitz PC) in opposition to the Petitioner's motion for Summary Judgment and in support of the Respondents Prehearing Motion to Dismiss, and having consulted by telephone with counsel for the Federal Mediation and Conciliation Service with regard to their opposition to a subpoena requiring an appearance and testimony, and after due deliberation this court having determined not to go forward with an evidentiary hearing and having rendered a Decision on the Record at pages 28, 29, 30, 31, and 32, of the

Transcript of the Motion Argument dated April 7, 2010 and certified April 8, 2010 annexed hereto and incorporated herein by reference; it is hereby,

ORDERED, ADJUDGED, AND DECREED, that the Respondents' prehearing motion to dismiss the Amended Petition is granted in part to the extent that the Petition alleges a cause of action for the Breach of Duty of Fair Representation on the part of the Amalgamated Transit Union Local 580, for failure to include the Amalgamated Transit Union Local 580 as a necessary party, and is in all other respects denied, and it is further,

ORDERED, ADJUDGED, AND DECREED, that the Petitioner's Motion for Summary Judgment is granted, and it is further,

ORDERED, ADJUDGED AND DECREED, that section 2.07 of the Collective Bargaining Agreement is void and unenforceable as a matter of law, and it is further,

ORDERED, ADJUDGED, AND DECREED, that the Decision of the Grievance Review Board dated August 20, 2003, denying the Petitioner disability pension benefits is hereby annulled, void, and of no force and effect, pursuant to CPLR Article 78, for the reasons stated in the Court's Oral Decision attached hereto, and it is further,

ORDERED, ADJUDGED, AND DECREED, that the Petitioner's request for Attorney's Fees, Costs, and the imposition of Sanctions in this proceeding is denied.

Dated: 4/19/10

ENTER

Hon. James P. Murphy, JSC

15:01 04/19/10 ONONDAGA COUNTY CLERK CP

STATE OF NEW YORK : FIFTH JUDICIAL DISTRICT
SUPREME COURT : COUNTY OF ONONDAGA

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JEFFREY THRALL, : Index No. 2003-7935

Petitioner, RJI No. 33-03-4643

vs. :

CNY CENTRO, INC. and CENTRAL NEW YORK REGIONAL TRANSPORTATION AUTHORITY, : MOTION

Respondents. :

-------------------------------------x

April 7, 2010

Onondaga County Court House
301 Montgomery Street
Syracuse, New York 13202

B E F O R E :

HONORABLE JAMES P. MURPHY
Supreme Court Judge

A P P E A R A N C E S:

ROBERT LOUIS RILEY, ESQ.

The University Building
120 E. Washington Street
Syracuse, New York 13202
Attorney for Petitioner

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C.
5010 Campuswood Drive
East Syracuse, New York 13057
Attorneys for Respondents
BY: CRAIG M. ATLAS, ESQ.
CHARLES E. SYMONS, ESQ.

Reported by: Marie E. Schmidt

THE COURT: Good morning.

MR. ATLAS: Good morning, Your Honor.

MR. RILEY: Good morning, Your Honor.

THE COURT: Counsel, I'd ask you to note your appearances for the record, please.

MR. RILEY: Robert Louis Riley, for the Petitioner Jeffrey Thrall.

MR. ATLAS: Craig M. Atlas and Charles E. Symons from the firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., for the Respondent CNY Centro, Incorporated and Central New York Regional Transportation Authority.

THE COURT: Gentlemen, we have a lot of procedural things to get to in the beginning here. This is a return date and a hearing date on an amended notice of petition and amended petition dated February 5th, 2004. I'm going to tell you my understanding. If I'm wrong, somebody correct me.

That petition sought to annul the findings of the Respondents' denying disability benefits to the Petitioner upon the grounds that Respondents failed to perform duties enjoined upon them by law. That their actions were unlawful, arbitrary, capricious and unreasonable pursuant to CPLR Article 78. That's led to a lot of back and forth, but that's what we're here to talk about today.

Now, we also have, Mr. Atlas, you brought a motion to dismiss, correct?

MR. ATLAS: That's correct, Your Honor.

THE COURT: I don't want to paraphrase yours, but why don't you state what your understanding of that motion is right now.

MR. ATLAS: Okay. Obviously, you've read the papers. The gist of our motion is that looking at the -- getting back to the pleadings, looking at the petition, it fails to state a cause of action, and if we were to proceed with a hearing, that the evidence would demonstrate that the Petitioner cannot prevail, as a matter of law, primarily, on the issue of the invalidity of the Grievance Review Board proceeding. It is our contention --

THE COURT: First of all, I'll give you a chance to argue in just a minute. I want to get stated what we have here to do deal with.

Mr. Riley, you have the petition itself and then you served some subpoenas, correct?

MR. RILEY: Yes, Your Honor, I did. I served subpoenas on the Federal Mediation Conciliation Service for the production of Mr. Garrow and also for the production of John Pinto. After production of an affidavit from the federal mediator and also business records certification of the Federal Mediation Conciliation Service --

THE COURT: You need to come up here. You're speaking low and quickly, and I want to make sure we get the record.

MR. RILEY: After production of an affidavit from Mediator Edward Garrow and the business records certification from general counsel of the Federal Mediation Conciliation Service, I withdrew those subpoenas.

THE COURT: So the motion to quash that we received is no longer necessary, as far as you're concerned?

MR. RILEY: As far as I'm concerned, it's not.

THE COURT: Mr. Atlas, do you agree with that?

MR. ATLAS: Yes, Your Honor. In fact, we received a copy of a letter from the US Attorney's Office indicating that that is moot as well.

THE COURT: I left them on call because I was in Rochester on three cases yesterday and I did not want to assume anything until we cleared it up. So, you gentlemen, are okay with their motion to quash as being -- you've withdrawn the subpoenas, so therefore, that motion is moot, correct?

MR. RILEY: Correct, Your Honor.

MR. ATLAS: Correct, Your Honor.

THE COURT: So that gets us back to the petition itself.

MR. RILEY: The petition itself, Judge, is limited at this point to the procedures that were utilized by Centro. We don't intend to proceed here with the underlying merits of the case or that fraud was committed or that his disability benefits were wrongfully terminated. But with regard to the fact that a mediator was present, there was no final combining determination rendered. The decision by John Renock that was issued on August --

THE COURT: Don't get into proof yet. I want to procedurally make sure we're clear. Where everybody is clear, including myself, as to what we're dealing with.

Assuming you prevail, what are you seeking?

MR. RILEY: If we prevail, we're seeking the Court to make a determination that the decision rendered on August 20th, 2003 is null and void. There was no final combining determination rendered. The proceeding was in effect a nullity. And also, we've asked you, and I looked at the addendum clause to the amended petition very carefully, and for such other further relief as to this Court deems just and proper. With regard to that, we're asking for limited relief with regard to this Court. Looking at the clause Section 2.07 and stating from a review of the evidence that's submitted on the Summary Judgment Motion that it's incapable of enforcement. Therefore, the parties go back to square one.

THE COURT: Which square one?

MR. RILEY: Before the GRB proceeding was held.

THE COURT: So according to 2.09, does that mean it goes back to arbitration?

MR. RILEY: No, we are not going to be bound by arbitration. Mr. Thrall was denied his rights under the Collective Bargaining Agreement. There is a case pending in the Federal Court right now that would resolve all of those rights.

THE COURT: Doesn't Section 2.09 say if you can't convene the board, it goes to arbitration?

MR. RILEY: Correct, Judge. But I believe there to be a gross mischaracterization of justice at this point, after six years, an appeal to the Appellate Court, to compel him to arbitrate anything under the Collective Bargaining Agreement.

THE COURT: I don't want to talk about

injustice yet. I'm just trying to understand your Collective Bargaining Agreement, and Mr. Atlas', your clients, to make sure I understand what square one is.

MR. RILEY: Square one is that we would have whatever rights Jeffrey Thrall had at that point, including any and all rights under the law to proceed with an action in court.

THE COURT: So, how do we decide what square one is? That would be for another day? Not in front me, unless, I guess, something doesn't proceed the way everyone else thinks they should.

MR. RILEY: And I believe that's correct, Judge. As I stated, we have a case pending in Federal Court right now.

Now, square one for me would be that it gets back to the point where this determination is a nullity and then we make our arguments with regard to exhaustion of administrative remedies and all those arguments would be argued in Federal Court.

But what I'm here for today is to get a decision from this Court that there was, in fact, no GRB proceeding conducted pursuant to the terms of the agreement, and it was incapable of having been performed that day.

THE COURT: Thank you. Mr. Atlas, I guess, I just want to hear your position on square one. Assuming if Mr. Riley prevails, what's your understanding?

MR. ATLAS: Yes, Your Honor. My understanding -- some of it is the same, that based on --

THE COURT: That's a start.

MR. ATLAS: That based on what the petition is asking for, I agree that the petition is seeking annulment of the outcome of the Grievance Review Board proceeding. We would, of course, respectfully argue that the petition should be dismissed.

THE COURT: And I'm still going to give you an opportunity to do that.

MR. ATLAS: If the Court were to grant the petition, I believe that the appropriate relief would be to send it back to the grievance procedure. But this is where I disagree with Mr. Riley. I believe at that point, the parties, the union and Centro, would have to look at what the grievance procedure says. Now, the grievance procedure, as it currently stands, still includes a Grievance Review Board as a possible option for this type of grievance.

THE COURT: Yes, like a third party.

MR. ATLAS: But you have to pick a third party, not automatically a federal mediator. And then the contract goes on to say if a neutral can't be made available, then it reverts to arbitration. The short answer would be we believe it would be sent back to the grievance procedure.

THE COURT: So we're focussed on the same determination. The remedy today would be a finding either upholding the decision of the review board or annulling it.

MR. ATLAS: That's correct.

THE COURT: Now, then I guess what I want to do is, Mr. Atlas, I'm going to take your motion to dismiss first. I had you summarize, but if you want to add anything else. I certainly don't want to cut you off with regard to that.

MR. ATLAS: Thank you, Your Honor. And I'll be very brief because I know you've lived with this case for awhile now and you've read the papers.

Essentially, our argument on the motion to dismiss that there was nothing invalid about what was done with the grievance procedure in connection with the Petitioner Mr. Thrall.

The parties followed the Collective Bargaining Agreement, which called for appeals of this type of grievance, which was not a discharge case, not a substance abuse case, to go before a review board.

THE COURT: Which is that 2.07?

MR. ATLAS: That's right, Your Honor. Which, by its terms, the contract said the Grievance Review Board shall consist of two people appointed by Centro, the company, two by the union, and a mediator from the Federal Mediation Conciliation Service.

THE COURT: And that's in essence, the rub, right?

MR. ATLAS: And that's what happened. The contract also said that the decisions shall be binding on all parties.

THE COURT: Talk to me about that. I guess if I'm devil's advocate, how did you get a decision? Isn't that what we're here to figure out?

MR. ATLAS: That's what the petition is arguing. Now, we contend that the contract called for and what, in fact, happened was that a majority of the members and a majority of the voting members of the Grievance Review Board decided to deny the grievance.

THE COURT: You're maintaining that a vote occurred and it was three nothing, because I think everybody agrees that the two union people left, or no?

MR. ATLAS: Yes. There is no dispute about that.

THE COURT: So that's what your claim is. It was a three nothing vote and, therefore, that complies?

MR. ATLAS: That's correct, Your Honor. As we've argued in our papers, we believe there is nothing illegal or invalid about that. We've cited case law to support our contention. The Petitioner has said, hey, we believe there aren't any cases out there.

THE COURT: Now, what if a vote didn't occur?

MR. ATLAS: If a vote didn't occur, then I believe, arguably, there would not have been a final decision. But the question might be what does that mean. Because under the grievance procedure, the Grievance Review Board was the last step of the grievance procedure. There was no further appeal for arbitration, no further appeal to the courts. Essentially, it would have been stuck at the level without any final decision.

Under those circumstances, it would have been up to one of the parties, either Centro or the union, to advocate to the other that something should be done. In fact, what happened here is after the Grievance Review Board meeting took place, Centro, Mr. John Renock will be here today to testify, wrote a letter to Charles Watson, the business agent of the union, said this is what happened, please correct me if I'm wrong. Mr. Watson didn't attempt to correct Mr. Renock and the matter -- that was it.

If the parties to the Collective Bargaining Agreement sought or agreed to do something further, they could either agree at that point to do something further, go to court for some order compelling --

THE COURT: Why wouldn't it be a mutual mistake? That seems to jump at me, is the union and Centro set up this procedure putting the mediator on there, but essentially, it seems like, or at least open to the interpretation, that they both thought the mediator could vote.

MR. ATLAS: That's absolutely correct, Your Honor.

THE COURT: And if that's the case, then that procedure is invalid, isn't it? A mutual mistake, not finding fault, but the premise that they both, union and Centro, put that mediator on was wrong, apparently. And I'll hear testimony if we get that far. But that certainly is what the papers suggest. And that is certainly what the motion to quash the subpoenas and all of that information that came in suggest that the mediators can be mediators, they can't vote.

MR. ATLAS: If the Petitioner is correct, I think you would be correct, Your Honor, that the outcome could be validated. We would argue, however, that this affidavit by Mr. Garrow saying, I notice the FMCS really made it very limited what he was going to say, I served as a mediator, not as an arbitrator. That, we believe, is consistent with the Collective Bargaining Agreement, which under 2.07 calls for a Grievance Review Board where the parties would first try to work out a voluntary resolution of the grievance, but by language of the contract and by practice. If they couldn't do that, there was a vote, there was a final determination.

THE COURT: And I agree that that's how it's set up. That's clearly the intent, and it seemed like all of that happened. But the problem is then the ultimate thing is it requires a "decision" of the review board.

MR. ATLAS: Yes.

THE COURT: That's where I think we have a dispute.

MR. ATLAS: And as we've cited the NABR case, the federal case, where similar claims were made where a mediator, even in that case, was referred to as giving an advisory opinion that the employer and the union agreed to take as direction -- as a decision that they were going to follow.

THE COURT: They agreed to that one. Both sides agreed to accept that advisor.

MR. ATLAS: Yes. And here the parties agreed that there would be a decision by this board that included a mediator, essentially, there as a tie breaking member.

THE COURT: I understand. All right. Mr. Riley, do you want to be heard on the motion to dismiss?

MR. RILEY: Your Honor, very simply on the motion to dismiss. There were three separate grounds set forth in their affidavit -- I'm sorry, Judge, in Mr. Atlas' affidavit. And the most pertinent was that it fails to state a cause of action upon which relief could be granted, which is clearly wrong.

The petition is very clear. It sets forth all the allegations that are necessary with regard to the facts that occurred here. It requests the relief, the nullification of the review board determination and for such other further relief as this Court deems just and proper. The allegation set forth --

THE COURT: Mr. Riley, you've got to speak slower or she's not going to be able to get a record.

MR. RILEY: I'm sorry. Although, in the petition itself, the amended petition itself, it says repeats and re-alleges. It's not set up as a separate cause of action. There is nothing in there for the breach of duty or fair representation that would require the Court to dismiss it as a separate cause of action.

THE COURT: What about the action against -- well, there seems to be an action against the union.

MR. RILEY: Well, that's what I'm speaking of, Judge, the DFR breach of duty of fair representation clause. There is no action set forth. It's merely allegations that is the union never did anything to correct this situation. And we're not asking for any relief against the union at this point.

As far as the other allegations in the petition or in the motion to dismiss are concerned, I believe that they're irrelevant and moot.

THE COURT: To the extent that there arguably is a state and a cause of action or a claim, whatever you want to call it, against the union, I'm granting the motion to dismiss that within that regard. Because I don't believe -- and they're certainly not a party to this and no relief would be awarded against them in that regard. I'm denying the remainder of the motion, because, frankly, I believe there is an issue of fact with regard to what occurred at the review board and whether or not, frankly, there was a vote or a decision in that regard.

I've seen affidavits putting that issue in dispute and I can't decide the motion as a matter of law unless I know the answer to that issue. Which gets us then to the summary judgment motion, which essentially is the Article 78 proceeding.

Mr. Riley, you want to be heard additionally on that?

MR. RILEY: Yes, I will, Judge. Your characterization of this as a mutual mistake, I can understand, and I think that is enough in and of itself to get this proceeding the relief granted here. However, Judge, I would say there is no material issue of fact here, whatsoever, with regard to Section 2.07 and the evidence that's before you right now. It took practically an act of congress to get that affidavit from Edward Garrow. His role on that day, as stated in his application, that he appeared as a mediator, not an arbitrator, not a tie breaker, not a decision maker, but as a mediator on that day.

THE COURT: That's his factual assertion.

MR. RILEY: That's his factual assertion. However, we have a little problem here with regard to the mediator's privilege that's been asserted by Mr. Atlas on behalf of Centro with the federal government. It is a very serious privilege under the law. And as you know the FMCS made motions to quash the subpoenas to have them come in and testify. We aren't going to get Mr. Garrow to come in here and testify. At least I don't believe it unless this Court were to --

THE COURT: You don't know that, Mr. Riley.

MR. RILEY: Well, then I will reserve that. But the fact of the matter is with regard to this and what his role was on that day, and the relief we've requested in the petition, it's very clear. The supporting papers that are next to this also contain a business records certification with regard to the Collective Bargaining Agreement, with regard to the grievance mediation agreement, and also a request for Grievance Mediation Services, which are admittedly signed by Centro.

Now, when you take a look at the documents that have been submitted here and the contracts that were signed, the affidavit of Mr. Garrow, that's been provided by the FMCS, there is no material issue of fact. Nothing that will come out of the hearings will be able to dispense with what Mr. Garrow has submitted, as far as that's concerned.

The timeliness of the business record certification, I will submit to this Court that on February 22nd, Mr. Atlas wrote the letter that's in the papers, that you're aware of, that requested the FMCS not provide any assistance whatsoever to Mr. Thrall or provide any documentation. All right.

As I said, it was very difficult to get the affidavit from the FMCS, also the business record certification. But they were provided. There was no delay in providing those to the Court. And I believe they comply with the requirements of CPLR 4518.

The terms of the Grievance Mediation Agreement itself are very specific. Everything that that mediator did is secret, it cannot be revealed. Not only do they have a problem with the mediator's privilege in eliciting any testimony from Mr. Garrow, but they also, from the contract that they signed, the FMCS, which my client, according to Mr. Bartlett, is bound by.

So not only do they have the law, which would prevent them, and they've argued to you, Judge, in their papers that they should be allowed to come in here and testify that Mr. Garrow voted and at the same time preclude him from being called as a witness and testifying to anything he did during that mediation proceeding. They can't have it both ways.

The mediator's privilege is something that I have no reasonable basis in law or fact to argue against. It's clearly established. I believe that the FMCS and the provision of their affidavit of Edward

Garrow --

THE COURT: Does that mediator privilege apply to process and procedure?

MR. RILEY: I don't believe that it applies to process and procedure, Judge. But I think that the case law that they've cited clearly goes to anything that happened during the conduct or the course of that mediation proceeding itself.

Now, having said that, he's told the Court in his affidavit what his role was when he went there. I went there as a mediator for a mediation and not a --

THE COURT: Mr. Riley, I don't mind hearing your argument. We're talking about the summary judgment part of this and issue of fact. I'm very well aware of Mr. Atlas has put in his papers and I'm very well aware of what you've put in your papers. I really don't want to rehash all of those things. So let's stay focussed.

I understand the mediator's privilege, I understand everything that you've said up to date here with this. I just want to get to the point of why do think there is not a factual dispute? Because it seems to me the issue is what happened and whether or not there is a vote.

Now, I don't know what the admissible evidence will be. I don't know what's going to come in front of me on that. But it certainly seems to be a disputed issue.

MR. RILEY: I don't believe that there is a dispute, Judge, because there can be no proof elicited to this Court that's contrary to what's been in the papers.

If we have a hearing and Mr. Nordheim were called to testify, his statements concerning what Mr. Garrow did are objectionable. He should not be allowed to testify predicated on the fact that it's hearsay. And it's very serious hearsay. Because by allowing him to testify, if Mr. Garrow is not permitted to come into court and even if this Court were to uphold my subpoenas, I can guarantee you we'll be at the Second Circuit on this with regard to validity of those subpoenas, because they will not stop in this Court. That will be appealed and it will be all the way to the federal courts.

The fact of the matter is is that this issue with regard to the proof here, that's why I wrote the things that I wrote in my papers, this clause of that contract, is fought with contingencies for abuse.

Now, also, they mention and you mention procedures set forth in the Collective Bargaining Agreement. There are no procedures set forth in the

Collective Bargaining Agreement to deal with this issue. And even if it's a mutual mistake, which is the best thing they could say about this, the determination is null and void.

Now, there is two witnesses --

THE COURT: Because why, Mr. Riley, if there is a mutual mistake?

MR. RILEY: Because there was no meeting of the minds with regard to what should have gone on there that day. And also under the contracts. But Judge, here's another thing. These contracts were signed not only by Centro, but they were signed by the union. These contracts clearly request for grievance mediation services and a grievance mediation agreement. These contracts were signed by Centro and the union. They both knew going into this that nothing that was done on that day could be final and binding.

We have two things that are going on here, we have 2.07 of the Collective Bargaining Agreement and we have what really transpired, pursuant to documentary evidence that's before the Court and those contracts. And that's what they agreed to, that's what occurred that day. I have an affidavit from the mediator stating that. The contracts are in evidence. They're legally in evidence before the Court. There is no material issue of fact. Thank you.

THE COURT: Mr. Atlas?

MR. ATLAS: Thank you, Your Honor. I know you've read the papers, but the operative statement from Mediator Ed Garrow that simply says -- after identifying who he is, on August 19th, 2003, I was present as a mediator and not as an arbitrator during a mediation pertaining to Jeffrey Thrall, CNY Centro, Incorporated and ATU Local 580. That's all he said. He didn't say anything about specifics of what went on there.

THE COURT: They certainly established by documentary evidence that the procedure was a mediation.

MR. ATLAS: In the view of the FMCS, at least after the fact, they viewed it as a grievance mediation. In the view of the parties, they viewed it as a grievance review board, which you know as we described --

THE COURT: Yes. The parties established this review board, but you entered into a contract with the one gentleman Garrow, I guess is the one that was there, to show up and serve a role. The question is what role. His role, it appears, contractually and according to his testimony, or at least the affidavit, was mediation. Your contracts call for mediation attempts but ultimately a decision.

MR. ATLAS: That's correct, Your Honor.

THE COURT: And those two are in the contract, aren't they?

MR. ATLAS: Well, even if what Mr. Riley refers to as a contract, which is the paperwork from the FMCS, that even allows the possibility of a mediator given what the FMCS would call an advisory panel. And as we've argued, the parties can agree that if the mediator says in his opinion the grievance should either be denied or be granted, the parties can rely on that.

THE COURT: Tell me how you establish that advisory opinion if the best case was given.

MR. ATLAS: We have the affidavit right now of Mr. Nordheim.

THE COURT: Who is a spectator/participant?

MR. ATLAS: He was a participant. He was one of the voting members who was still in the room at the end of the Grievance Review Board meeting.

THE COURT: But he can't testify to that, can he, if I want to assert your mediator privilege?

MR. ATLAS: Well, there is two aspects to that, Your Honor. First of all, the purpose of that, if there is a mediator's privilege, the purpose of that is so that the parties, the employer and the union, are free during the session, whatever we call it --

THE COURT: I completely understand that. And I support the rationale of it. But, however, having said that, I'm getting one of five affidavits and your position is I can't have the other four, right?

MR. ATLAS: Well, my position is two of the members walked out.

THE COURT: Right. That's true.

MR. ATLAS: One of the members was a federal mediator who cannot testify.

THE COURT: Well, I don't know that. You've objected to him testifying. And at least with regard to all of the things that happened, but my question is does the mediator, and I'm not asking, this is rhetorical, but does the mediator privilege go to the issue of if he took the stand and said did you vote or not. We're past the mediation, aren't we? Under your own contract, we're past the mediation attempts, we're now into that final stage that neither party contemplated. But that's where we're at. And so, how is that inconsistent with him testifying?

I understand he says if he wants to pull you aside and ask you what do you think and then go through the settlement negotiations back and forth as a typical mediation, certainly neither party probably can testify to that. But how do I know that Mr. Nordheim isn't basing his decisions on those things as well. And, therefore, once I open the door, it's open, isn't it?

MR. ATLAS: First, Your Honor, regarding what the federal mediator viewed. First of all, I cannot speak to the FMCS, what they've already done. So in their papers --

THE COURT: Again, you've objected also. And I'm asking you to justify to me your objection to that when you want to put on Nordheim.

MR. ATLAS: First of all, based on the argument made by the FMCS and my review of the federal regulations, it's my belief that anything that Mr. Garrow did in his capacity as an employee of the Federal Mediation Conciliation Service in trying to help parties resolve a despite, is covered by that federal regulation and by that --

THE COURT: So is anything Mr. Nordheim says, isn't it? Why not?

MR. ATLAS: Well, if that is true, Your Honor, then I don't know why we have been trying this case in one way or another for six and a half years. Because the whole basis for the petition, even starting with the language of the petition itself talks about --

THE COURT: You do know why, Mr. Atlas, you do know why, is because the issue of whether or not there was a vote or not was determined in error based on misinformation that came to the Court previously under Judge Roy. That's why it took this long to get here.

MR. ATLAS: The length of time is immaterial.

THE COURT: I agree that it's immaterial.

MR. ATLAS: Even going back to day one when the petition was filed, the petition talked about the allegations about what happened at the Grievance Review Board meeting. Mr. Riley sought to subpoena the mediator to testify. Mr. Riley, in fact, subpoenaed members of Centro's management. He wanted this hearing to talk about what happened at the Grievance Review Board meeting. We're here to defend ourselves, Centro to defend itself from claims brought by the petitioner.

THE COURT: Yes. You're here to defend that your process provided him due process, that's what you're here to defend. That's correct.

MR. ATLAS: That's right. And the whole issue about being able to testify about what happened at that meeting is only -- Centro didn't bring this. Centro didn't say we want to bring in testimony, we want to have affidavits --

THE COURT: I understand. But your position to me seems logically inconsistent. Because I can either decide this on documentary evidence, which is what Mr. Riley would prefer to have me do. And I can look into contracts and I can look in all the places where it mentions the word mediation. I can look at the intent of the Collective Bargaining Agreement, which sets up mediation and arbitration, which would suggest a decision, which is kind of inconsistent with the notion of mediation. I can look at all those things or I can start taking factual proof, which is what you want me to do, to some extent, because you want to put Nordheim's affidavit in front of me. And I don't care, and he can testify here, but then I'm not allowed to hear from the arbitrator or mediator as to whether or not a vote was taken. I guess I just see those two positions as inconsistent.

MR. ATLAS: Well, Your Honor, again, the only reason -- we didn't ask for a hearing. In fact, Your Honor, I think the last time we had oral argument, I suggested it's an Article 78 proceeding, a hearing is -- the Court can order it, but it's relatively rare. And I suggested at that point we didn't need a hearing.

I believe if, Your Honor, chooses to do so, you can decide based on the papers, but since the Petitioner bears the burden of proof in this proceeding, I believe if you just look at the papers, he fails in meeting his burden of proof. Thanks.

THE COURT: Anything further?

MR. RILEY: Very briefly?

THE COURT: Very briefly. New things, Mr. Riley.

MR. RILEY: Very briefly. Your Honor, I think that you have summarized exactly what the problems are here. And I would state that with regard to this and deciding on our papers, the affidavit of Edward Garrow speaks for itself. And I move that the Court can decide this matter on the papers. There is no necessity for conducting a hearing because, as you've stated from the bench, it would basically be pointless.

THE COURT: I'm going to take a 15-minute recess and come back with a decision.

THE COURT OFFICER: All rise. Court is adjourned to chambers.

(Whereupon a recess was taken.)

THE COURT: At this point, the Court is prepared to render a decision in this matter. At issue in this case is the Section of 2.07 of the Collective Bargaining Agreement that calls for a decision of the review board with regards to the grievance that was submitted by Mr. Thrall.

The Court has considered having a hearing with regard to what transpired at that Grievance Review

Board, and at this time I'm deciding not to proceed with a factual hearing in that regard for several reasons.

There is, because of the participation in the Federal Mediation Conciliation Service, federal statutory and regulatory policies precluding any testimony by them or their representative that was on the board from testifying in any sort of factual proceeding and in allowing any information as to what happened in that proceeding. That is consistent with what we've referred to previously this morning as a mediator's privilege.

In reviewing the contract between the union and Centro, that contract clearly incorporates the federal regulations, in particular CFR Section 1425.2 and following, which mirrors -- almost mirrors the content of the mediation agreements signed by Centro and the union, which clearly establishes the role of Mr. Garrow in this proceeding as a mediator.

It goes on to provide that the mediator has no authority to compel a resolution of the issue in dispute as presented. It provides that, at best, an advisory opinion could be given by Mr. Garrow. And even if I were to assume that it was, that advisory opinion, by nature of the contract, signed by the union and Centro, has to be mutually accepted or if not it provides an alternate remedy that that will proceed to arbitration. Although, different from the provision of the Collective Bargaining Agreement, that contract is signed by representatives of the Collective Bargaining Agreement. And I'll leave that for another day for someone else to determine whether or not or which provision of those two contracts prevails.

But to the extent that Mr. Garrow or anyone else were to appear and testify as to what transpired at the review board, I view that as being, in essence, parole evidence, offering information that is contrary to the clear contractual relationship between the parties and FMCS in regard to this dispute.

I also, frankly, believe were it not for the contract, that I would probably estop the management of Centro from putting on information as to what transpired at that meeting, given the fact that the other determinative member of the board is not available to testify, either by way of subpoena or voluntarily, based upon federal statutory regulations and policies that prohibit him to do so.

I think both the union and Centro agreed to a mediation, and that's what they got. And to the extent that that is inconsistent with the Collective Bargaining Agreement, that is in essence, in my opinion, a mutual mistake. When they drafted the Collective Bargaining Agreements, I would wager that both sides thought that by picking this FMCS member, they got a credible person with knowledge on mediation and resolving disputes, but where they were both in error is that that person cannot be a tie breaker. And therefore, to the extent that Mr. Thrall was not provided with the rights and process that was provided in the grievance committee, I'm not saying that he -- I don't believe he could have been provided with it by basis of the mutual mistake in the contract.

I'm annulling the decision of the Grievance Review Board because there is no decision. And there could not be a decision of it based upon the contractual language. And I should be clear, the contractual language of the Collective Bargaining Agreement and more so by the contractual agreement between the parties entering into the grievance mediation agreement that's dated July 23rd, 2003. The parties specifically took away any argument or any right of Mr. Garrow to decide that issue.

At best it was an advisory opinion, as I stated earlier, and that would just simply lead to arbitration. If the two sides didn't agree, clearly, Mr. Thrall and the union representative did not agree by the fact that they left.

That's the decision of the Court. If you would prepare a proposed judgment, Mr. Riley, submit it upon notice to Mr. Atlas.

MR. RILEY: Just one clarification point for me, when you dismissed the due to the fair representation cause of action, I want to make absolutely clear it's without prejudice.

THE COURT: It's based on the fact -- I don't know what the time parameters or anything else is in there, I'm not extending any time parameters, I'm dismissing it on the fact that they were a necessary party and they weren't made a party to this proceeding here. Whatever that means in a further proceeding somewhere else will be left to have someone else to determine.

MR. RILEY: Thank you, Your Honor.

THE COURT: Thank you.

C E R T I F I C A T I O N

I, Marie E. Schmidt, an Official Reporter in the Fifth Judicial District, State of New York, do hereby certify that the foregoing is a true and complete transcript of my stenographic notes taken in the above-entitled matter, held at the time and place first above mentioned.

MARIE E. SCHMIDT

Dated: April 8, 2010